

Incumbent LECs argue that, for loop transport elements that are currently combined requesting carriers should not be allowed to substitute such combinations of elements for existing, regulated special access services.⁹⁵⁰ According to incumbent LECs, allowing this substitution would either force them to increase local rates or undermine universal service.⁹⁵¹

1. Enhanced Extended Link

a. Background

1. In the *Local Competition Order*, the Commission identified loops and transport as network elements subject to the unbundling obligation of section 251(c)(3). In rule 51.315(b), the Commission prohibited incumbents from separating network elements that are currently combined.⁹⁵² In addition, the Commission adopted rules 51.315(c) – (f) requiring incumbent LECs to combine unbundled network elements in any manner, even if those elements are not currently combined.⁹⁵³ The Eighth Circuit

⁹⁵⁰ Bell Atlantic Reply Comments at 26; SBC Reply Comments at 28.

⁹⁵¹ Letter from William B. Barfield, Associate General Counsel, BellSouth Corporation, to Lawrence E. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 96-98, at 1.6 (filed Aug. 9, 1999) (BellSouth Aug. 9, 1999 *Ex Parte*); Letter from Susanne Guyer, Assistant Vice President, Federal Regulatory, Bell Atlantic, to Magalie R. Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 (filed Aug. 25, 1999); Letter from J. Richard Teel, Vice President, BellSouth, to Lawrence E. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket 96-98, at 2 (filed Sept. 8, 1999) (BellSouth Sept. 8, 1999 *Ex Parte*). See also Letter from Kathleen B. Levitz, Vice President-Federal Regulatory, BellSouth Corporation, to Magalie R. Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98, at 4 (filed August 26, 1999).

⁹⁵² Rule 51.315(b) states: "Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines."

⁹⁵³ Rule 51.315(c)-(f) states:

(c) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network, provided that such combination is:

(1) Technically feasible; and

(2) Would not impair the ability of other carriers to obtain access to the unbundled network elements or to interconnect with the incumbent LEC's network.

(d) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.

(e) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(1) or paragraph (d) of this section must prove to the state commission that the requested combination is not technically feasible.

overturned a number of the Commission's rules, including rules 51.315(b)–(f).⁹⁵⁴ Rule 51.315(b), however, was reinstated by the Supreme Court.⁹⁵⁵ In light of the reasoning set forth in the Court's opinion, the Commission asked the Eighth Circuit to reinstate rules 51.315(c)–(f).⁹⁵⁶

2. In the *Notice*, we sought comment on whether we should identify additional network elements beyond the seven listed in the *Local Competition First Report and Order*.⁹⁵⁷ We also sought comment on whether, in light of the Supreme Court's decision, we could require incumbent LECs to combine network elements that are not currently combined, such as an unbundled loop with unbundled transport.⁹⁵⁸

3. In response to the *Notice*, a number of parties, including competitive LECs and state commissions, argue that we should either identify a new network element comprised of unbundled loop, multiplexing/concentrating equipment, and dedicated transport (the enhanced extended link or "EEL") or, alternatively, reinstate rules 51.315(c)–(f) which require incumbent LECs to provide unbundled loop and transport elements on a combined basis.⁹⁵⁹ Incumbent LECs argue that we should not identify the EEL as a separate network element because it would constitute an unlawful combination of two or more elements not currently combined.⁹⁶⁰ The incumbent LECs also argue that we cannot reinstate rules 51.315(c)–(f) because they are currently pending before the Eighth Circuit.

b. Discussion

(f) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(2) of this section must prove to the state commissions that the requested combination would impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

47 C.F.R. §§ 51.315(c)-(f).

⁹⁵⁴ *Iowa Utils. Bd. v. FCC*, 120 F.3d at 813.

⁹⁵⁵ *Iowa Utils. Bd.*, 119 S.Ct at 736-738.

⁹⁵⁶ *Iowa Utils. Bd. v. FCC*, Brief for Respondents at 79-87 (Oral argument was held on September 17, 1999. To date, no decision has been announced).

⁹⁵⁷ *Notice* at para. 33.

⁹⁵⁸ *Id.*

⁹⁵⁹ AT&T Comments at 136-37; Cable & Wireless Comments at 40-41; Choice One Joint Comments at 23. *See also* California PUC Comments at 6; ALTS Comments at 62; CoreComm Comments at 36-37.

⁹⁶⁰ *See, e.g.*, GTE Comments at 84-85; Ameritech Joint Reply Comments at 26-28.

1. We decline to define the EEL as a separate network element in this Order. As discussed above, the Eighth Circuit is currently reviewing whether rules 51.315(c) – (f) should be reinstated. We see no reason to decide now whether the EEL should be a separate network element, in light of the Eighth Circuit's review of those rules.

2. A number of commenters argue that we should reaffirm the Commission's decision in the *Local Competition First Report and Order*.⁹⁶¹ In that order the Commission concluded that the proper reading of "currently combines" in rule 51.315(b) means "ordinarily combined within their network, in the manner which they are typically combined."⁹⁶² Incumbent LECs, on the other hand, argue that rule 51.315(b) only applies to unbundled network elements that are currently combined and not to elements that are "normally" combined.⁹⁶³ Again, because this matter is currently pending before the Eighth Circuit, we decline to address these arguments at this time.

3. We note that in the *Local Competition First Report and Order*, and again in this proceeding, we identify the loop and dedicated transport as separate unbundled network elements.⁹⁶⁴ In particular, as discussed above, we define the loop as the functionality that extends from the customer demarcation point to the main distribution frame associated with the incumbent LEC's central office switch. We define dedicated transport as the transmission facilities dedicated to a particular customer between wire centers owned by the incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting carriers. To the extent an unbundled loop is in fact connected to unbundled dedicated transport, the statute and our rule 51.315(b) require the incumbent to provide such elements to requesting carriers in combined form. Thus, although in this Order, we neither define the EEL as a separate unbundled network element nor interpret rule 51.315(b) as requiring incumbents to combine unbundled network elements that are "ordinarily combined," we note that in specific circumstances, the incumbent is presently obligated to provide access to the EEL. In particular, the incumbent LECs may not separate loop and transport elements that are currently combined and purchased through the special access tariffs. Moreover, requesting carriers are entitled to obtain such existing loop-transport combinations at unbundled network element prices.⁹⁶⁵

⁹⁶¹ ALTS Comments at 79-80. See also Excel Comments at 14; Net2000 Comments at 22; NEXTLINK Comments at 42-43; e.spire Joint Reply Comments at 17-18; GSA Reply Comments at 17.

⁹⁶² *Local Competition First Report and Order*, 11 FCC Rcd at 15648, para. 296.

⁹⁶³ GTE Reply Comments at 84-85; SBC Reply Comments at 28.

⁹⁶⁴ *Local Competition First Report and Order*, 11 FCC Rcd at 15689-93, 15718, paras. 377-85, 440.

⁹⁶⁵ See 47 U.S.C. § 252(d)(1).

DRAFT OF CHAIRMAN MATHIAS – 5/4/00**b. Commission's Conclusion**

Consistent with our earlier policy findings in Docket 97-0404/0519/0525, this Commission finds that ISP bound calls are local and should be due reciprocal compensation. However, the Commission also takes note of the evidence in the record which suggests dramatic shifts in the utilization of the local exchange network, associated with the explosion in Internet traffic, and the resultant effects these changes are having upon the issue of reciprocal compensation. Due to these changes, the issue of reciprocal compensation demands further scrutiny by this Commission in order to ensure that just and reasonable rates are in place in Illinois.

Furthermore, ~~Since~~ the issues raised here related to reciprocal compensation are likely to be very similar to those raised in other arbitration proceedings and other market participants have not been party to this proceeding, we conclude that this arbitration decision is not the proper place for the Commission to adopt a position which will have far-reaching competitive and economic effects upon the telecommunications marketplace. Therefore, the Commission will adopt Focal's proposed reciprocal compensation rate of \$0.005175 per minute and hereby directs Staff to initiate a proceeding in order to further address this issue of reciprocal compensation. ~~Further, given the complexity associated with this issue, the Commission at this time indicates its desire that any decision reached in that proceeding not trigger retroactive payments or refunds to parties.~~

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Showtis, Bill

From: Hester, John
Sent: Monday, May 08, 2000 2:01 PM
To: Showtis, Bill; Woods, Don
Subject: 00-0027 Focal

Attached please find proposed changes from Commissioner Hurley.

hurley changes.doc

legislative.doc

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In response to Ameritech's suggestion that the Commission defer consideration of this issue until the FCC finally decides the manner in which reciprocal compensation is to be paid for ISP bound calls, Focal responds that such an outcome would likely deprive Focal of cost recovery to which it is entitled for an extended period of time, noting that it took the FCC almost two years to respond to the request for clarification that resulted in its last attempt at addressing the ISP issue. Focal further argues that the suggestion is unworkable because it would require Focal to track ISP bound traffic until such time as the FCC acts, while its Chief Operating Officer testified that such tracking is impossible.

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Consistent with our earlier findings in Docket 97-0404/0519/0525, this Commission finds that ISP bound calls are local and should be due reciprocal compensation. However, the Commission also takes note of the evidence in the record which suggests dramatic shifts in the utilization of the local exchange network, associated with the explosion in Internet traffic, and the resultant effects these changes are having upon the issue of reciprocal compensation. Due to these changes, the issue of reciprocal compensation demands further scrutiny by this Commission in order to ensure that just and reasonable rates are in place in Illinois.

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~~The Commission concludes that Focal should receive reciprocal compensation for ISP bound calls at the Ameritech tandem rate of \$0.005175 per minute of use. There is not a shred of credible evidence in this docket that, functionally, ISP bound calls differ in any manner from any local call. While the FCC has muddied the waters considerably in this area as it tries to maintain jurisdiction of the issue, the undisputed fact remains that a call to an ISP is a call from one local usage customer to another local usage customer, in other words, a call utilizing telephone exchange service, subject to state commission jurisdiction and the payment of reciprocal compensation to the terminating carrier under Section 251(b)(5) of the Act. Ameritech's arguments boil~~

~~down to two predicates. ISPs should be paying access charges to ILECs when they transmit calls to distant web sites. This is a matter for the FCC. The second argument is current rates do not reflect reality because the widespread use of the internet has undermined many of the assumptions (especially the impact of hold times on the set up cost components of those rates) that went into setting those rates in the first place. While that may be true, Ameritech is well versed in the manner in which it may seek to redress rates that are not just and reasonable, and it may be expected to follow those avenues as conditions warrant. This does not change the ultimate fact one iota. Calls to the Internet are, from a functional and technical perspective, indistinguishable from the entire universe of local calls and should be treated as such for purposes of establishing appropriate levels of reciprocal compensation.~~

~~While the Commission appreciates Staff's attempt to forge a compromise in this matter, we conclude that its proposal, which would require the segregation and tracking of ISP bound traffic by the combined efforts of Ameritech and Focal, is basically unworkable. While Staff was of the opinion that such a process could work, the unequivocal evidence is that Focal is unable to identify ISP bound calls separately from any other call.~~

3. Should Focal should be allowed to count ISP bound traffic as local exchange service for the purpose of self-certifying that it provides a significant amount of local exchange traffic? (Section 9.2)

a. Positions of the Parties

Focal has requested that Ameritech convert special access circuits to an unbundled network element loop/transport ("UNE") combination known as an enhanced extended link ("EEL"). The obligation to provision loop transport combinations was addressed by the FCC in a Supplemental Order to CC Docket 96-98. The FCC concluded that LECs would not be required to provision loop/transport UNEs unless the requesting carrier certified that it provided a particular customer with a "significant amount of local exchange service."

The parties originally disagreed over several issues involved with the provisioning of EELs. These included: whether Focal should be required to self certify that it was, in fact, providing a customer with a significant amount of local exchange service, the propriety of including particular parameters for defining "significant" in the contract, the compensation to be paid for termination and service ordering charges, the manner in which the EELs would be collocated and finally, whether Focal could count ISP bound traffic in making its certification. Because the initial briefs of Focal and Ameritech addressed some, but not all of these issues, a status hearing was held on March 31, 2000. Prior to the hearing, the parties, via e-mail, submitted their understanding of outstanding issues. At the hearing, representatives of Focal and Ameritech indicated that the only outstanding matter to be determined under issue

deferred the issue of whether CLECs could employ unbundled network elements solely to provide exchange access service. Ameritech concludes that allowing Focal to use an unbundled special access line to serve an ISP, would, by definition, be providing solely exchange access service.

Ameritech argues that both Focal and Staff have misconceived the distinction between treating IPS traffic as local exchange traffic for the purposes of reciprocal compensation and the treatment of service to an ISP as local exchange traffic for the purpose of unbundling special access circuits into EELs. Ameritech acknowledges that the FCC has indicated that ISP traffic might, in some circumstances, be treated as local; however, Ameritech asserts that this does not transform the underlying nature of the traffic which is, according to Ameritech, interstate access service from which ISPs have been excused from paying access charges.

In response to Focal's arguments urging the Commission to ignore a detrimental conclusion of the FCC, Ameritech argues that such a result would be contrary to the Supremacy Clause of the United States Constitution and that the argument is simply an improper collateral attack on various decisions of the FCC. In response to Focal's "technical infeasibility" argument, Ameritech first notes that other jurisdictions have ruled that requesting carriers need not receive compensation for terminating ISP calls which, of necessity, calls for segregating this traffic from all other traffic. From this, Ameritech concludes that there must be some way to accomplish this task. In addition, Ameritech notes that Focal agreed to percentage based measurement in its communication to the FCC detailing the parameters it endorsed as the basis for making the determination that it was providing a significant amount of telephone exchange service to an enduser. The implication of this, according to Ameritech, is that measurement of ISP and non-ISP traffic is possible. Ameritech concludes by arguing that if, in fact, Focal cannot identify ISP bound traffic, this is enough reason to deny it the opportunity to obtain the unbundled loop/transport combination.

b. Commission's Conclusion

In this issue, the Commission must again address the conundrum created by the FCC in its quest to maintain jurisdiction over matters relating to the Internet. Here, similarly to its position in issue two, Focal urges us to find that ISP calls are local in nature. Ameritech disagrees. ~~The issue, however, is not as readily decided as it was in issue two. In issue two, we were faced with deciding the manner in which Focal and Ameritech were to be compensated for terminating calls. Because ISP calls were indistinguishable from other types of local calls from a technical and functional point of view, we decided that they should be compensated in the same manner. The issue before us here is distinct because it does not deal with the functionality or costs of the calls (which we have previously ruled are identical) but rather with the local or long distance nature of the calls, which has been muddled considerably by the FCC. Staff's view that we should not require Focal to self certify that it is not treating ISP call as local because the FCC has not imposed this requirement not only misses the issue, which is~~

whether Focal should be allowed to count such calls as local exchange service, but seems to admit that Ameritech is correct in its position, since Staff indicates that it does not expect Focal to count ISP calls as local, which is exactly what Focal is asking to be allowed to do.

Based upon the record before us, we must agree with Focal that, for purposes of complying with the FCC's directive in the Supplemental Order, Focal should be allowed to count ISP bound traffic as local exchange service in self certifying that it will be providing a significant level of local exchange service through an EEL. While the issue is distinct from our consideration of reciprocal compensation, ~~where the absence of any functional or technical distinctions between calls terminated to an ISP and calls terminated to any other customer convinced us that the level of compensation should be the same,~~ much of the same reasoning applies. Here, the FCC, for whatever reason, has tied the LEC's obligation to unbundle a special access circuit to the CLEC's obligation to provide significant amounts of local exchange service to a particular customer. The FCC, through a number of proceedings, has specifically held that it is vested with jurisdiction over ISP bound traffic because, when analyzed on an "end to end" basis, it is not local exchange traffic. Nonetheless, as noted previously in this order, the FCC has continued to allow the states to impose reciprocal compensation requirements, as if it were local exchange traffic. Here, based upon the totality of the circumstances, we conclude that, for purposes of the self-certification requirement, Focal should be allowed to count ISP traffic as local exchange service. The parties are directed to amend the interconnection agreement to reflect this conclusion and, if necessary, to reflect the agreed upon resolution of the remaining issues relating to requests for EELs as represented at the status hearing held on March 31, 2000.

4. Should Focal be required to establish a point of interconnection within 15 miles of the rate center for any NXX code that Focal uses to provide foreign exchange service? (Section 4.3.12)

a. Positions of the Parties

Foreign exchange ("FX") service allows a customer to obtain an NXX code (the first three digits of a seven-digit telephone number) that is assigned to a different geographic area than where the customer is actually located. People in the geographic area assigned to the particular NXX code can reach the FX customer for the price of a local call, even though the call is actually transported much further than a local call. Ameritech indicates, for example, that a call from Aurora to downtown Chicago travels more than 15 miles and would thus normally be a Band C toll call. Ameritech states that if the recipient of the call in downtown Chicago is an FX customer assigned to the same NXX code as the originating caller in Aurora, the originating caller would only be billed for a local call since Ameritech's billing systems recognize an intra-NXX call as a local call.